

CALIFORNIA ENERGY COMMISSION1516 NINTH STREET
SACRAMENTO, CA 95814-5512

**STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

Implementation of Restructuring)	Docket No. 98-REN-New
Legislation (Public Utilities Code)	Notice of Hearing
Sections 381, 383.5 and 445)	RE: Petition on Fourmile Hill and
[AB 1890, SB 90]): Renewables)	Telephone Flat Geothermal Projects,
)	New Renewable Resources Account

**NOTICE OF RECOMMENDED COMMITTEE DECISION
REGARDING CALPINE SISKIYOU GEOTHERMAL PARTNERS, L.P. AND
CALIFORNIA ENERGY GENERATION CORPORATION GEOTHERMAL PROJECTS**

The Energy Commission's Business Meeting will be held:

Date of Meeting has changed to WEDNESDAY, JANUARY 9, 2002
10 a.m.

CALIFORNIA ENERGY COMMISSION
1516 Ninth Street
Hearing Room A
Sacramento, California
(Wheelchair Accessible)

As part of a special Business Meeting scheduled for January 9, 2002, the Energy Commission will consider proposed recommendations by the Commission's Electricity and Natural Gas Committee (Committee) regarding a petition by Calpine Siskiyou Geothermal Partners, L.P. ("Calpine") and California Energy General Corporation ("CalEnergy") to extend their funding awards under the New Renewable Resources Account, pursuant to Public Utilities Code Section 383.5(c)(2)(B).

The Committee's findings and recommendations with respect to the subject petition are presented in the enclosed *Electricity and Natural Gas Committee Decision on Petition of Calpine Siskiyou Geothermal Partners, L.P. and California Energy General Corporation*.

In summary, the Committee's findings and recommendations are as follows:

Based on the written and oral comments received as part of the Committee hearing, the Committee finds that the Fourmile Hill Project will not be operational by January 1, 2002, due to circumstances beyond Calpine's control. The Committee also finds that the Telephone Flat Project will not be operational by January 1, 2002, due to circumstances beyond CalEnergy's control.

With respect to the Fourmile Hill Project, the Committee recommends that the on-line date for purposes of the project's funding be extended an additional 41 months to June 1, 2005, subject to the following condition: If the project's appeals and legal challenges are not finally resolved by June 1, 2003, such that the project is able to commence construction by this date, the project's funding award will be automatically suspended and subject to cancellation by the Commission, unless the project developer demonstrates to the Commission's satisfaction that (1) any additional project delays are beyond the developer's control; AND (2) the project is still capable of coming on-line by June 1, 2005.

With respect to the Telephone Flat Project, the Committee similarly recommends that the on-line date for purposes of the project's funding be extended an additional 41 months to June 1, 2005, subject to the following condition: If the project's appeals and legal challenges are not finally resolved by June 1, 2003, such that the project is able to commence construction by this date, the project's funding award will be automatically suspended and subject to cancellation by the Commission, unless the project developer demonstrates to the Commission's satisfaction that (1) any additional project delays are beyond the developer's control; AND (2) that the project is still capable of coming on-line by June 1, 2005.

Written Comments

The Energy Commission encourages members of the public to submit written comments. Twelve copies of any comments filed by mail or in person should be provided to the Commission's Dockets Office. Parties may file electronically but must also submit one paper copy (one-sided please) to the Docket Office. Comments should be sent to:

**California Energy Commission
Dockets Office
Attn: Docket REN-98-NEW
1516 Ninth St., MS-4
Sacramento, CA 95814-5512
E-Mail: docket@energy.state.ca.us**

All written materials filed with the Dockets Office will become part of the public record in this proceeding. To ensure that the full Commission has adequate time to review comments submitted before the December 28, 2001 Business Meeting, comments must be submitted no later than close of business December 26, 2001.

Assistance

The Energy Commission's Public Adviser provides assistance to the public regarding Energy Commission procedures and participation in Energy Commission activities. Anyone wishing to obtain information on how to participate in this meeting may reach the Public Adviser's Office by phone at (916) 654-4489, toll free at (800) 822-6228, or by e-mail at [pao@energy.state.ca.us]. If you have a disability and need assistance in order to participate in this hearing, please contact Priscilla Ross at (916) 653-6631. Technical questions regarding the subject matter of this notice may be addressed to Suzanne Korosec at (916) 654-4516, or by e-mail at [skorosec@energy.state.ca.us]. News media should direct inquiries to Assistant Director Claudia Chandler at (916) 654-4989.

Date: December 14, 2001

**STATE OF CALIFORNIA ENERGY
RESOURCES CONSERVATION AND
DEVELOPMENT COMMISSION**

MICHAL C. MOORE
Commissioner and Presiding Member
Electricity & Natural Gas Committee

Date Mailed: December 18, 2001
Mass Mail List: Master63/New,Exi,Eme

Electricity and Natural Gas Committee Decision on Petition of Calpine Siskiyou Geothermal Partners, L.P. and California Energy General Corporation

Background

Assembly Bill 1890 ([AB 1890] enacted September 23, 1996) provides \$540 million for the support of renewable electricity generation technologies. These funds are collected from the ratepayers of the state's investor-owned utilities to support existing, new, and emerging renewable electricity generation technologies.

The Renewable Energy Program was established by Senate Bill 90 ([SB 90] enacted October 12, 1997) to distribute these funds. The program consists of four separate accounts, each addressing differing needs within the renewables industry: the Existing Renewable Resources Account, the New Renewable Resources Account, the Emerging Renewable Resources Account, and the Customer-Side Renewable Resource Purchases Account.

The New Renewable Resources Account was originally allocated 30 percent of the AB 1890 funds, or \$162 million, to provide assistance to renewable electricity generating facilities that become operational after September 26, 1996. These funds are intended to foster the development of new in-state renewable electricity generation facilities and secure for the state the environmental, economic, and reliability benefits that those facilities provide. Funds in the account are awarded through periodic "auctions" in which developers of prospective renewable energy projects compete for funding in the form of production incentives paid out over a maximum of five years.

The California Energy Commission has held three such auctions to date. Detailed rules for the auctions are contained in the *Guidebook for the Renewable Energy Program, Volumes 2A and 2B – New Renewable Resources Account* (*Guidebook*, available at [www.energy.ca.gov/renewables]), as well as in the solicitation document for each of the three auctions, Notice of Auction (NOA) 500-97-506, NOA 500-00-504 and NOA 6-01-3.

To participate in the auctions, developers must submit bids for the amount of incentives that the developers require to compete in the broader electricity market, along with a detailed project description, schedule, and estimate of how much renewable generation the project will provide during the first five years of operation.

The first auction was held in June 1998. Eligible bids in the auction were ranked from lowest cents per kilowatt-hour incentive request to highest. Beginning with the lowest request, eligible bids were accepted until funds were fully allocated. Auction winners were

notified in writing on July 10, 1998 that their projects had been accepted as eligible for funding.

According to the *Guidebook for the Renewable Energy Program - Volume 2, New Renewable Resources Account* and the NOA 500-97-506, winning projects from the first auction must come on-line (begin generating electricity) by December 31, 2001 or sooner. This on-line date requirement is based on the version of Public Utilities Code section 383.5(c)(2)(B) existing at the time the June 1998 auction was held.

In September of 2000, Governor Davis signed Assembly Bill 995 into law, which amended section 383.5(c)(2)(B) so that projects participating in the New Renewable Resources Account could come on-line later than December 31, 2002 and still receive five full years of payments, provided that the Commission makes a formal finding that the delay in on-line date resulted from circumstances beyond a project developer's control.

Calpine Siskiyou Geothermal Partners, L.P. ("Calpine") and California Energy General Corporation ("CalEnergy") were two of the winning bidders in the June 1998 auction. Calpine was conditionally awarded \$20,792,000 for its 49.9 megawatt Fourmile Hill Geothermal Project (funding award agreement REN-98-017, approved by the Energy Commission in March 1999). CalEnergy was conditionally awarded \$28,239,438 for its 48 megawatt Telephone Flat Geothermal Project (funding award agreement REN-98-018, also approved by the Energy Commission in March 1999).

The Fourmile Hill project consists of a 49.9 megawatt geothermal power plant, including five production well pads, three injection well pads, and above-ground pipelines. Transmission facilities consists of the substation and an approximately 24 mile long 230 kV transmission line that will be constructed on National Forest System lands. The Telephone Flat project consists of a 49.9 megawatt geothermal power plant, including 18 well pads, pipelines, and a 230 kV transmission line. The preferred route for the transmission line would join with the transmission line from the Fourmile Hill project about 5 miles to the northeast of the Telephone Flat power plant and extend as a single line for the remaining approximately 16 miles to the interconnection near Tionesta.

Both projects are located in Siskiyou County on National Forest lands managed by the U.S. Department of Agriculture, Forest Service ("USFS"). The power plant sites for both projects are on federal leases within the Glass Mountain Known Geothermal Resource Area ("KGRA") managed by the U.S. Department of Interior, Bureau of Land Management ("BLM"). The designated lead agencies for both projects for purposes of the California Environmental Quality Act ("CEQA") and the National Environmental Policy Act ("NEPA") were the Siskiyou County Air Pollution Control District ("APCD") and the BLM and USFS. These agencies prepared a joint environmental impact statement/report ("EIS/EIR") for each project. The draft EIS/EIR for the Fourmile Hill project was issued in July 1997 and the final EIS/EIR issued in October 1998. The draft EIS/EIR for Telephone Flat Project was issued in May 1998 and the final EIS/EIR issued in March 1999.

At the time of the 1998 auction, both Calpine and CalEnergy submitted project schedules to the Energy Commission showing that their projects would be on-line before January 1, 2002. The Fourmile Hill Project was originally scheduled to begin operating in December 2001, and the Telephone Flat Project was scheduled to begin

operating in September 2001. However, the projects have experienced a series of delays in project development and currently report revised on-line dates of after January 1, 2002.

On October 16, 2001, Calpine Corporation acquired all shares in CalEnergy and its affiliate, CE Newberry from Mid American Energy Holdings Co. This acquisition includes ownership and control of the CalEnergy Telephone Flat Project and any and all interests of these corporations in the project.

Calpine and CalEnergy submitted a formal petition ("Petition") to the Energy Commission on November 6, 2001, asking to have the awards for the Fourmile Hill Project and the Telephone Flat Project extended pursuant to the amended Public Utilities Code section 383.5(c)(2)(B). The petition requested the Energy Commission to make a determination that the two projects will not be operational by January 1, 2001 due to "circumstances beyond the control of the developer."

Committee Hearing

The Electricity and Natural Gas Committee (Committee) held a hearing on December 5, 2001 regarding the joint petition submitted by Calpine and CalEnergy. The hearing was held from 1:00 p.m. to 3:00 p.m. at the California Energy Commission, 1516 Ninth Street, Hearing Room B, Sacramento, California, with Commissioner Michal C. Moore, presiding.

The purpose of the hearing was to give stakeholders and members of the public an opportunity to provide information to assist the Committee in making recommendations whether:

- the facts support the findings necessary to extend the funding awards. Namely, whether Calpine and CalEnergy used reasonable efforts to get their projects on-line by December 31, 2001, and whether circumstances beyond their control prevented their projects from coming on-line by this date;
- a funding award extension is appropriate, and if so, the length of time the funding awards should be extended;
- the funding awards should be reduced or penalized, and if so, the amount or percentage of the reduction or penalty.

The notice of the hearing was mailed to nearly 700 interested parties on the Renewable Energy Program's mailing list on November 26, 2001. The Committee originally asked for comments to be submitted by interested parties by close of business December 3, 2001, but at the request of one participant, the Mount Shasta Bioregional Ecology Center, that time period was extended to close of business December 5, 2001, the day of the hearing. Stakeholders and members of the public were encouraged to focus comments on input relevant to making the above recommendations.

Participants in the hearing included:

Lynn M. Haug, Attorney, Ellison, Schneider & Harris LLP (Calpine Counsel)
Jeffery Harris, Attorney, Ellison, Schneider & Harris LLP (Calpine Counsel)
Richard Oehler, Attorney, Perkins Coie, LLP (Calpine Counsel)
Jack Pigott, Electric Regulatory Director (Calpine Corporation)
John Miller, Vice President, (Calpine Corporation)
Joe Ronan, Vice President (Calpine Corporation)
Diane Fellman, Energy Law Group LLP, representing NEO California, LLC
Nancy Rader, representing California Wind Energy Association
Gabriel Herrera, Renewable Energy Program Counsel, Energy Commission
Marwan Masri, Renewable Energy Program Manager, Energy Commission
Tim Tutt, Assistant Renewable Energy Program Manager, Energy Commission
Suzanne Korosec, Manager, New Renewable Resources Account, Energy Commission
Jim Hoffsis, Supervisor, Renewable Energy Program Supply Side Accounts, Energy Commission

In addition, two parties participated in the hearing via teleconference:

Peggy Risch, Environmental Research Associate, Mount Shasta Bioregional Ecology Center
Michelle Berditschevsky, Executive Secretary, Native Coalition for Medicine Lake Highlands Defense

Attendees included:

Steven Kelly, Independent Energy Producers
Charlene Wardlow, Calpine Corporation
Manuel Alvarez, Southern California Edison Company
Sean Haggerty, Bureau of Land Management
Kristi McHan, Energy Commission staff
Todd Lieberg, Energy Commission staff

During the hearing, oral comments were tape recorded and subsequently transcribed for the record.

Discussion

The discussion that follows will first address the requisite findings under California Public Utilities Code section 383.5(c)(2)(B), then the length of any funding award extensions, and lastly any appropriate reduction or penalty of the projects' awards.

A. Findings Under Public Utilities Code Section 383.5(c)(2)(B)

Under California law, a project awarded funding from the Commission's New Renewable Resources Account remains eligible to receive five years of funding even if the project is not operational by January 1, 2002, if the Commission finds the delayed operation was due to circumstances beyond the project developer's control. This law is set forth in Public Utilities Code section 383.5 (c)(2)(B), which provides as follows:

Funds expended for production incentives shall be paid over a five-year period commencing on the date that a project begins electricity production, provided that the project shall be operational prior to January 1, 2002, ***unless the State Energy Resources Conservation and Development Commission finds that the project will not be operational prior to January 1, 2002, due to circumstances beyond the control of the developer.*** Upon making this finding, the State Energy Resources Conservation and Development Commission shall pay production incentives over a five-year period, commencing on the date of operation, provided that the date that a project begins electricity production may not extend beyond January 1, 2007. [Emphasis added.]

To make the requisite finding, the Energy Commission must determine: (1) whether the project will be operational by January 1, 2002; and (2) whether there were circumstances beyond the developer's control that prevented the project from coming on-line by this date.

1. Fourmile Hill Project

With respect to the Fourmile Hill Project, it is universally accepted by Calpine and all commenting parties that the project will not be operational by January 1, 2002. The parties, however, disagree as to the reasons for the delayed operation. In the Petition, Calpine points to several factors which it claims were beyond its control that delayed the project's anticipated on-line date of December 2001. These factors include a delay of approximately 20 months in the issuance of the project's federal Record of Decision ("ROD") by the USFS and the BLM, delays in the resolution of appeals before the Interior Board of Land Appeal ("IBLA") challenging BLM's issuance of the project's ROD, a decision by the IBLA to stay project development pending resolution of the appeals by project opponents, and delays associated with the BLM's issuance of permits to drill exploratory wells. (Petition, pg. 2).

According to the Petition, the Siskiyou County APCD, the BLM, and the USFS formally initiated preparation of the project's EIS/EIR in June of 1996. In July 1997, these lead agencies issued the project's draft EIS/EIR and in October 1998 issued the project's final EIS/EIR. At that point, Calpine anticipated that the permitting processes would be completed on a schedule that would enable the project to begin operating by January 1, 2002. According to the Petition, it ordinarily takes two to six months after noticing the final EIR/EIS for the lead agencies to issue a Record of Decision. In the case of the Fourmile Hill project, however, the BLM and the USFS did not issue the project's ROD until May 31, 2000, approximately 20 months later. (Petition, pgs. 5, 7).

The Petition also indicates that appeals challenging the project's ROD that were filed with the USFS and the IBLA (the BLM's appellate authority) have delayed the project's on-line date. On June 30, 2000, the Save Medicine Lake Coalition, the Pit River Tribe, and affiliated parties (collectively "SMLC/PRT") filed appeals challenging the project's ROD at the IBLA, and requested a stay from the decision placing the ROD in full force and effect. Calpine also filed an appeal to the IBLA, challenging the ROD's establishment of a five-year moratorium on any other geothermal development in the Glass Mountain KGRA, and appealing

other terms and conditions of the ROD.¹ Calpine filed a memorandum at the IBLA opposing the SMLC/PRT request for stay, as did the BLM. On August 23, 2000 the IBLA issued an order granting a stay from the decision placing the ROD into full force and effect, pending resolution of the appeals. As a result of these appeals and the IBLA stay, Calpine claims that it has been forced to delay activities preparatory to construction and operation of the project. (Petition, pgs. 5,6, 8.)

The project opponents and Calpine also filed appeals with the USFS on July 17, 2000. The USFS denied those appeals on August 31, 2000. (Petition, pg 6.)²

The Petition also indicates that delays in the resolution of the IBLA appeals have delayed the project's on-line date. More than 15 months have passed since Calpine and the SMLC/PRT filed their appeals on the project's ROD with the IBLA, yet a final decision from the IBLA is still pending. It is Calpine's understanding that the IBLA's delay in issuing a final decision is caused by a backlog of appeals at that agency. Calpine expects to get a favorable decision from IBLA within the next six months. (Petition, pg. 10, 11.)

Lastly, the Petition indicates that delays associated with the BLM's issuance of permits to drill exploratory wells at the project site have contributed to the delay in the project's on-line date. The Petition states that Calpine's permit applications to drill exploratory wells for the project were denied by the BLM on January 23, 2001, on the grounds that issuance of the requested permits would violate the IBLA's August 23, 2000 stay on the project. Calpine appealed the BLM decision on February 21, 2001, and on the same day filed at the IBLA a Request for Expedited Clarification or Modification of Stay requesting the IBLA to confirm that the August 23, 2000 stay order did not restrict Calpine's ability to pursue exploratory well drilling. On April 26, 2001, the IBLA issued an order vacating the BLM's decision and remanded the matter back to the BLM for consideration of Calpine's permit applications. In the order, the IBLA noted that the drilling of exploratory wells was not subject to the IBLA's stay order, since the well drilling had been authorized under a separate BLM Decision Record in 1996 which had not been appealed. On remand, the BLM approved three well drilling permits and Calpine's Notice of Intent associated with another well on May 25, 2001.

¹ CalEnergy also appealed the five year moratorium, since it effectively blocked development of the Telephone Flat project. The moratorium was subsequently terminated in a June 15, 2001 decision issued by the BLM, with concurrence by the Acting Assistant Secretary of the Interior. That decision is final and unappealable.

² In addition to the USFS appeal, the Committee is aware of other legal challenges that have likely contributed to the Fourmile Hill project's on-going delays. These include (1) an appeal of the Siskiyou County APCD Negative Declaration for the exploration project, which was denied by Siskiyou County Board of Supervisors in July 1999; (2) an appeal of the Siskiyou County drilling permits for the exploration project which was denied by the Hearing Board in September 1999; (3) an appeal of the Siskiyou County APCD EIR for the development project which was denied by Siskiyou County Board of Supervisors in April 2000; (4) an appeal of the Siskiyou County APCD Authority to Construct permit for the development project which was denied by the Hearing Board in May 2000; (5) a CEQA lawsuit filed in Siskiyou County Superior Court involving the exploration project which was summarily dismissed in August 2000, and an appeal of that dismissal which was dismissed in February 2001; (6) a CEQA lawsuit involving the development project which was dismissed with prejudice in March 2001; and (7) several additional CEQA lawsuits involving the development project which may have already been dismissed as a consequence of the appellants failure to pay court ordered costs associated with preparation of the administrative record. (March 12, 2001 letter from Calpine representative Jack Pigott to Commissioner Michal C. Moore.)

The Acting Assistant Secretary of the Interior concurred in the BLM's decision, precluding further appeal to the IBLA. (Petition, pgs. 9, 10.)

Various parties opposed to the development of the Fourmile Hill Project offered written comments challenging the Petition. These parties included the Mount Shasta Bioregional Ecology Center ("BEC"), Save the Medicine Lake Coalition, Native Coalition Medicine Lake Highlands Defense, Californians for Renewable Energy, Inc., and ten separate individuals representing their own interests. While all of these parties offered general comments opposing both the project and an extension of the project's funding award, only BEC offered specific comments germane to the Committee's determination at hand. Consequently, only BEC's comments are discussed here.³

In its written comments, BEC points to two factors which it believes affected the project's ability to come on-line by January 1, 2002. The first is what BEC characterizes as Calpine's unrealistic milestones for the project's development, and the second is Calpine's inaction in moving forward with the project's exploratory well drilling activities. BEC claims that both factors were within Calpine's control. (BEC's 12/3/01 Comments, pgs. 5,6)

Regarding the project's development milestones, BEC claims that Calpine's anticipated on-line date of December 2001 was unrealistic, given the time it normally takes to secure project permits, the known opposition to the project, and likelihood of project-related litigation. BEC insists that Calpine was aware of the opposition to the project very early in the environmental process, because of the substantial public comments opposing the project and the conclusions in the lengthy EIS/EIR, but did not take this opposition into consideration when establishing the project's development milestones. BEC insists that had Calpine taken this opposition into consideration, it would have needed to identify an on-line date that extended well beyond the December 31, 2001 date specified in the Energy Commission's auction, and thereby jeopardized the project's chances of receiving funding under the auction. (BEC 12/3/01 Comments, pgs 10, 11, 12)

BEC also claims that Calpine's failure to move forward with its approved exploratory well-drilling activities delayed the project's first year of construction, and in turn the project's on-line date. These exploratory well drilling activities are identified as the First Year of Construction in the project's Final EIS/EIR. BEC's written comments provide a chronology of key dates and decisions regarding the project's exploratory well drilling activities, and suggest that Calpine was capable of initiating work on the project's exploratory activities as early as 1996, when the NEPA process for these activities was completed, but chose not to. (BEC 12/3/01 Comments, pgs. 6,7,8)

In addition to comments concerning the project's delays, BEC argues that the project's funding award should be cancelled because Calpine failed to file timely quarterly reports with the Energy Commission and failed to properly inform the

³ As discussed earlier, the purpose of the hearing was limited in scope and intended to gather information pertinent only to the extension of the project's funding awards under Public Utilities code section 383.5(c)(2)(B). As a result, many of the comments offered by parties opposed to the project, including comments concerning the project's environmental effects, were not relevant.

Finding Regarding the Fourmile Hill Project

Based on the written and oral comments received as part of the Committee hearing, the Committee finds that the Fourmile Hill Project will not be operational by January 1, 2002, because of circumstances beyond Calpine's control. There is ample evidence in the record to support this finding. Calpine's petition points out the delays in both securing the project's ROD and resolving the IBLA appeal concerning it. It is not unreasonable to expect a ROD to be issued within 2 to 6 months after the final environmental impact statement is published, yet in this case it took nearly 20 months for the BLM and USFS to issue the project's ROD. The IBLA appeals concerning the project's ROD are still pending after almost 18 months because of a backlog of cases at the IBLA. These delays are clearly beyond Calpine's control.

BEC argues that Calpine was aware of the project's opposition and should have anticipated the project's delays in establishing development milestone. Even if this were true, and Calpine knew of the opposition and appreciated its significance, it is still inappropriate to hold Calpine responsible for the delays associated with the project's opposition. BEC also claims that Calpine's anticipated on-line date of December 2001 was unrealistic, and that this date was arbitrarily selected to comply with the on-line date requirements specified in the Energy Commission's NOA. While there is some evidence to suggest that this was an optimistic on-line date for the Fourmile Hill project, it was not unreasonable for Calpine to expect the project's permitting to proceed in a timely manner. Moreover, the Energy Commission's NOA did not require bidders to identify the exact on-line date of their projects. Rather, the NOA asked bidders to identify their projects' "expected on-line date" and to include in their Project Award Packages an expected project schedule that is tied to the achievement of specified pre-construction and construction milestones. Furthermore, the Energy Commission fully anticipated that some winning projects in auction would need to be altered or delayed because of permitting constraints and conditions, and included provisions in the New Renewable Resources Account guidelines to address these changes and delays. Calpine has complied with these provisions by keeping the Energy Commission informed of the changes and delays associated with the Fourmile Hill project.

BEC also argues that Calpine's inaction in moving forward with the project's exploratory well drilling contributed to the project's delays and kept the project from coming on-line by January 1, 2002. While there is evidence to suggest that Calpine could have sought the project's exploratory well drilling permits sooner in time, Calpine's failure to do so did not stall the project or prevent it from coming on-line by January 1, 2002. The project is stalled because the IBLA appeals have not been resolved. Short of a resolution of these appeals in Calpine's favor, the project cannot go forward. This is true regardless of any exploratory well that Calpine may or may not drilled. In addition, the Committee believes it was reasonable for Calpine to delay its exploratory activities until it had more certainty on the likely outcome of IBLA appeal and knew for sure whether the project would be constructed.

Regarding BEC's comments concerning the project's quarterly reports, the Committee recognizes that Calpine submitted some of the quarterly reports late. However, the Committee does not believe that these actions alone justify a cancellation of the project's funding award. The purpose of the quarterly reports is to keep the Energy Commission apprised of the status of the project, and Calpine has done this both orally and in writing. Neither the Energy Commission guidelines nor the NOA required a cancellation of funding awards under these circumstances.

2. Telephone Flat Project

With respect to Telephone Flat Project, it is universally accepted by Calpine and all commenting parties that the project will not be operational by January 1, 2002. As in the case of the Fourmile Hill Project, the parties disagree as to the reasons for the Telephone Flat Project's delayed operation. In its petition Calpine points to several factors which it claims delayed the project's on-line date. These factors include a delay of approximately 15 months in the issuance of the project's federal ROD by the USFS and the BLM, the BLM and USFS imposition of a moratorium on the development of geothermal projects other than the Fourmile Hill project within the Glass Mountain KGRA, and the issuance of a negative ROD for the project by the BLM and USFS which resulted in further appeals. (Petition at pgs. 2 and 3).

According to Calpine's Petition, the Siskiyou County APCD and the BLM and USFS formally initiated preparation of the project's EIS/EIR in May 1997. In May 1998 these agencies issued the project's draft EIS/EIR in which it recommended approval of the project. In March 1999, the project's final EIS/EIR was issued, in which the lead agencies again identified the project's approval as the preferred alternative. Ordinarily, it takes two to six months after noticing the final EIR/EIS for the lead agencies to issue a Record of Decision. However, in the case of the Telephone Flat Project, the BLM and USFS did not issue their joint ROD for the project until May 31, 2000; approximately 15 months later. (Petition, pgs. 7,13, 14.)

Calpine's Petition also points to the BLM and USFS imposition of a five-year moratorium on the development of geothermal projects as a second factor contributing to the project's delayed on-line date. In the Fourmile Hill ROD, the BLM and USFS approved the development of the Fourmile Hill Project, but established a moratorium barring further geothermal development in the Glass Mountain KGRA for five-years as a means of addressing project opponent concerns about the cumulative impact. The five-year moratorium was in effect for more than a year, and terminated by BLM on June 15, 2001.⁴ (Petition, pgs. 16, 17.)

Lastly, the Petition points to the BLM and USFS negative ROD for the project as a third factor contributing to the project's delayed on-line date. The project cannot proceed without a reversal of the negative ROD. As a result, CalEnergy

⁴ The June 15, 2001 decision was made by the BLM alone because in its August 31, 2000 appeal decisions, the USFS took the position that the moratorium was solely within BLM's decisionmaking authority. In its decision, the BLM concluded that the moratorium was inconsistent with new policy directives encouraging the production of energy generally, and particularly energy from renewable sources such as geothermal power plants.

has had to file various appeals in an effort to reverse the negative ROD and move forward with the project. On June 30, 2000, CalEnergy filed an appeal with the IBLA challenging the Telephone Flat project's negative ROD. It also filed a separate appeal with the IBLA challenging the moratorium in the Fourmile Hill ROD. On July 17, 2000, CalEnergy filed appeals with the USFS challenging both the Telephone Flat ROD and the moratorium in the Fourmile Hill ROD. On September 19, 2000, CalEnergy requested the IBLA to dismiss without prejudice its appeal of the Telephone Flat ROD, and subsequently filed a complaint with the U.S. Court of Federal Claims for claims arising from the Telephone Flat ROD. At the present time, CalEnergy is attempting to resolve all disputes currently pending in the Court of Federal Claims and before administrative agencies. (Petition, pgs. 13, 14, 18, 19)⁵

The same parties opposed to the development of the Fourmile Hill Project offered written comments opposing the development of the Telephone Flat Project and an extension of the project's funding award. With the exception of BEC's comments, the comments of these parties were generic and not germane to the Committee's determination at hand. Consequently, only BEC's comments are discussed here.

In its written comments on the Telephone Flat project, BEC again insists that the project's delays were self-inflicted and point to what it characterizes as unrealistic milestones for the project's development. BEC also attacks Calpine's claim that the moratorium on geothermal development in the Glass Mountain KGRA contributed to the project's delays and ability to be on-line by January 1, 2002. (BEC's 12/31/01 Comments, pgs.10, 11, 12; BEC's 12/5/01 Comments, pg. 6)

Regarding the project's development milestones, BEC claims that CalEnergy's anticipated on-line date was unrealistic, given the time it normally takes to secure project permits, the known opposition to the project, and likelihood of project-related litigation. BEC insists that CalEnergy was aware of the opposition to the project very early in the environmental process, because of the substantial public comments opposing the project and the conclusions in the lengthy EIS/EIR, but did not take this opposition into consideration when establishing the project's development milestones. Had it taken this opposition into consideration, BEC insists CalEnergy would have needed to identify an on-line date that extended well beyond the December 31, 2001 date specified in the Energy Commission's auction, and thereby jeopardize the project's chances of receiving funding under the auction. (BEC 12/3/01 Comments, pgs 10, 11, 12)

BEC also challenges Calpine's claims that the moratorium on geothermal development in the Glass Mountain KGRA contributed to the project's delays and ability to be on-line by January 1, 2002. BEC insists that the Telephone Flat Project was simply denied in a negative ROD by the discretionary action of the BLM and USFS as the lead agencies. (BEC's 12/5/01 Comments, pg. 6)

⁴ According to Calpine Counsel Richard Oehler, Calpine is currently engaged in settlement negotiations with the federal government that could resolve all disputes pending before the Court of Federal Claim and result in a reversal of the Telephone Flat Project's negative ROD. Mr. Oehler indicates that a settlement could be reached very soon, in a matter of weeks or months. (Transcript, pgs. 22-25)

In addition to comments concerning the project's delays, BEC argues that the project's funding award should be cancelled because CalEnergy failed to file timely quarterly reports with the Energy Commission and failed to properly inform the Energy Commission of the status of the project in these reports. (BEC's 12/3/01 Comments, pg. 9, 10; BEC's 12/5/01 Comments, pgs. 5, 6)

Findings Regarding the Telephone Flat Project

Based on the written and oral comments received as part of the Committee hearing, the Committee finds that the Telephone Flat Project will not be operational by January 1, 2002, because of circumstances beyond CalEnergy's control. There is ample evidence in the record to support this finding. The Petition points out delays attributable to both the issuance of the project's ROD and its recommendations opposing the project's development. It is not unreasonable to expect a ROD to be issued within two to six months after the final environmental impact statement is published, yet in this case it took nearly 15 months for the BLM and USFS to issue the project's ROD. Moreover, when the ROD was issued, the BLM and USFS recommended the project not be developed, in contrast to the agencies' earlier recommendations in the project's Draft and Final EIS/EIRs. As a result, CalEnergy has had to file various appeals to move forward with the project. These delays are clearly beyond CalEnergy's control.

BEC argues that CalEnergy was aware of the project's opposition and should have anticipated the project's delays in establishing development milestone. Even if this were true, and CalEnergy knew of the opposition and appreciated its significance, it is still inappropriate to hold CalEnergy responsible for the delays associated with the project's opposition. BEC also claims that Calpine's anticipated on-line date of September 2001 was unrealistic, and that this date was arbitrarily selected to comply with the on-line date requirements specified in the Energy Commission's NOA. While there is some evidence to suggest that this was an optimistic on-line date for the Telephone Flat Project, it was not unreasonable for CalEnergy to expect the project's permitting process to proceed in a timely manner. Moreover, as stated earlier, the Energy Commission's NOA did not require bidders to identify the exact on-line date of their projects, but instead ask that they identify their projects' "expected on-line date" and to include in their Project Award Packages an expected project schedule. The Energy Commission fully anticipated that some winning projects in auction would need to be altered or delayed because of permitting constraints and conditions, and included provisions in the New Account guidelines to address these changes and delays. CalEnergy has complied with these provisions by keeping the Energy Commission informed of the changes and delays associated with the Telephone Flat Hill Project.

Regarding BEC's comments concerning the project's quarterly reports, the Committee recognizes that CalEnergy submitted some of the quarterly reports late. However, the Committee does not believe that these actions alone justify a cancellation of the project's funding award. The purpose of the quarterly reports is to keep the Energy Commission apprised of the status of the project, and CalEnergy has done this both orally and in writing. Neither the Energy Commission's guidelines nor the NOA require a cancellation of funding awards under these circumstances.

B. Length of Award Extension

Based on the findings outlined above, the Committee recommends that the funding awards for the Calpine Fourmile Hill Project and the CalEnergy Telephone Flat Project be extended.

Public Utilities Code section 383.5(c)(2)(B) states that “the date that a project begins electricity production may not extend beyond January 1, 2007.” However, it is the Committee’s opinion that extending the proposed on-line date for the Fourmile Hill and Telephone Flat projects to January 1, 2007 would unduly tie up program funds and be contrary to the public policy goals of the program, particularly if the projects are never completed. In this case, the funds conditionally awarded to the Fourmile Hill and Telephone Flat projects could have been better used to support other renewable projects with a higher certainty of coming on-line sooner and thereby providing more immediate environmental, economic and reliability benefits to California.

The Guidebook, NOA 500-98-506, and Funding Award Agreements REN-98-017 and REN-98-018 all identify December 31, 2001 as the date projects are expected to be on-line. This date was recommended in the Energy Commission’s Policy Report on AB 1890 Renewables Funding, and was based in part on input from the renewables industry on a reasonable amount of time needed to construct a renewable electricity generating facility. In addition, the Energy Commission determined that the December 31, 2001 date would encourage projects to be constructed expeditiously and prevent projects from unnecessarily tying up funds for an indefinite period of time, thereby making the most efficient use of the available funds.

The Committee has considered these important goals in making its recommendations regarding the length of the award extension for the Fourmile Hill and Telephone Flat projects.

1. Fourmile Hill Project

With respect to the Fourmile Hill Project, the Committee recommends that the on-line date for purposes of the project’s funding be extended an additional 41 months to June 1, 2005, subject to the following condition: If the project’s appeals and legal challenges are not finally resolved by June 1, 2003, so that the project is able to commence construction by this date, the project’s funding award will be automatically suspended and subject to cancellation by the Energy Commission, unless the project developer demonstrates to the Energy Commission’s satisfaction that (1) any additional project delays are beyond the developer’s control; AND (2) the project is still capable of coming on-line by June 1, 2005.

Given the circumstances, the Committee believes this is a reasonable extension. As discussed earlier, Calpine expects to receive a favorable decision on the IBLA appeals within 6 months. Based on this assumption, and a two-year construction

schedule,⁶ Calpine anticipates that the Fourmile Hill project could be constructed and on-line by late 2004. (Petition, pg. 11)

The Committee's recommended extension would give Calpine an additional 18 months to resolve any outstanding issues and commence construction by the summer of 2003. Although it could be argued that this additional time is not needed, given Calpine's expectation of an IBLA decision within six months, opposition to the project remains high and will continue to delay the project, if not stop it altogether. To address these potential delays and ensure that funding is not tied up indefinitely for a project that may never be built, the extension is conditioned on the project proponent resolving all legal challenges and securing all necessary permits to commence project construction by summer of 2003. If construction does not start by this time, the project's funding award will automatically be suspended and subject to the Energy Commission's immediate cancellation.

In addition, the Committee notes that even if the project's current funding award was canceled, there is additional renewable funding available for which the project could possibly qualify. Under Assembly Bill 995 (Stat. 2000, Ch 1051) and Senate Bill 1194 (Stat. 2000, Ch. 1050), an additional \$135 million/year is being made available to the Energy Commission to fund renewable projects. The collection of these funds has already been authorized by the Legislature.

2. Telephone Flat Project

With respect to the Telephone Flat Project, the Committee similarly recommends that the on-line date for purposes of the project's funding be extended an additional 41 months to June 1, 2005, subject to the following condition: If the project's appeals and legal challenges are not finally resolved by June 1, 2003, so that the project is able to commence construction by this date, the project's funding award will be automatically suspended and subject to cancellation by the Energy Commission, unless the project developer demonstrates to the Energy Commission's satisfaction that (1) any additional project delays are beyond the developer's control; AND (2) that the project is still capable of coming on-line by June 1, 2005.

The Committee believes this is a reasonable extension for the reasons noted above with respect to the Fourmile Hill Project. CalEnergy expects to reach a settlement with the federal government within months that could resolve all dispute pending before the U.S. court of Federal claims and result in a reversal of the Telephone Flat's negative ROD. If this occurs, it may be possible for CalEnergy to commence construction of the project in the summer of 2002 and be on-line by late 2004. The extension would give CalEnergy an additional year to serve as a buffer to resolve any unanticipated legal challenges.

C. Reduction of Funding Awards

The *Guidebook*, the NOA 500-98-506, and the Funding Award Agreements for the Calpine and CalEnergy projects all contain language providing for reductions in funding awards for auction winners for nonperformance or other reasonable cause:

⁶ Based on oral comments of Calpine Representative Jack Pigott. (Transcript, pg. 39)

- The *Guidebook Volume 2B*⁷ states, “All projects are expected to come on-line prior to January 1, 2002. Any project failing to come on-line before this date may still be eligible to receive monthly payments, but will receive no payments for any generation beyond December 31, 2006, five years from the expected on-line date. In addition, the Commission will determine whether the project should have its incentive payments reduced or canceled, or whether any other penalties should be imposed on the project, as a result of the delayed on-line date.”
- The *Guidebook Volume 2A*⁸ states: “Winning projects are expected to come on-line as an eligible renewable generator as specified in the applicable Notice of Auction; those who come on-line later than the date specified in the applicable Notice of Auction may have their awards reduced or terminated by the Commission. In short, late projects will not receive payments beyond five years of their on-line date, but might for some period less than that, and run the risk of receiving reduced payments or no payments at all.”
- The NOA 500-98-506 states: “Winning projects are expected to come on-line as an eligible renewable generator prior to January 1, 2001; those who come on-line later than this date may have their awards terminated by the Commission, and in no case will they receive incentive payments for generation after December 31, 2006.”

Funding Award Agreements Nos. REN-98-017 (Calpine) and REN-98-018 (CalEnergy) state in section 9, Project Schedule: “Awardee shall complete the project milestones by the dates identified in the attached Project Award Package, or the Commission-approved changes or delays thereto. Failure to do so may result in Awardee’s funding award being canceled or reduced for cause as specified in the NOA.” Section 20, Understanding of Renewable Guidelines and Their Application, states “Awardee . . . acknowledges that [the Renewable Guidelines] govern the payment of any funds under this Agreement and authorize the Commission to cancel or reduce Awardee’s funding award or funding award payment for reasonable cause . . .”

The purpose of potential award reductions was to encourage winning projects to be built and come on-line as soon as possible, penalize project developers for unreasonable delays, and prevent developers with no intention of developing a serious project from bidding in an auction solely to tie up the money and prevent it from being used by the developer’s competitors.

Both Calpine and CalEnergy have worked diligently to get their respective projects permitted, despite numerous setbacks and legal challenges. As discussed earlier, these delays were beyond Calpine and CalEnergy’s reasonable control. Consequently, it is questionable whether a reduction of the projects’ funding awards can serve the purposes intended by the Commission.

The Petition did not specifically discuss the potential for reducing the funding awards for the Fourmile Hill and Telephone Flat Projects; however, in comments made at

⁷ Volume 2B, “Implementation of Auction Results,” was developed after the June 1998 auction was held.

⁸ After the Commission decided to hold subsequent auctions, Volume 2A was revised to reflect requirements for all subsequent auctions instead of simply those for the June 1998 auction.

the Committee hearing, Calpine stated that while the Renewable Energy Program guidelines do give the Commission the discretion to assess penalties, it would be inappropriate and unfair to do so in this case since the delays in meeting project milestones were caused by administrative agency actions and permitting delays over which Calpine had no control.⁹

BEC and all other parties presenting comments either in writing or orally at the hearing made no recommendations regarding reducing the funding awards for these project, instead advocating that the funding awards simply be terminated.

Given the circumstances, the Committee recommends that neither project have their funding award reduced. The developers appear to have worked diligently and in good faith to get their projects on-line. In addition, the Committee feels that the conditions of the award extension will encourage the developer to construct the projects in an expeditious manner.

⁹ Based on oral comments of Lynn Haug on behalf of Calpine. (Transcript, pg. 20)